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NOV 18 1987

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## Development Limitations

January 10, 1986

This is one in a series of informational monographs  
that the MAPC hopes will be of use to member communities

## DEVELOPMENT LIMITATIONS

Communities have begun to show an interest in limiting both the rate and the absolute amount of development within their boundaries. While there are techniques available--building caps and phased development, for example, that effectively limit growth--important legal questions need to be evaluated when a community considers their use.

The most pressing of these legal questions pertains to the taking of land without compensation. The Massachusetts courts have ruled that a law may postpone the right to develop property, but it may not prohibit its development forever. For that reason, an annual building cap which limits building permits each year may be legal if it is reasonable to expect that the property in question could ultimately be developed.

A building cap that limits building to a specified number of units for the foreseeable future, however, may be unconstitutional if development may not be expected to ever occur.

Several approaches to limit development are discussed below. Communities considering such techniques should consult with legal counsel to ensure the protection of property rights.

1. Absolute population (or, at least, dwelling unit) cap. Boca Raton, FL, tried to set an absolute limit of 40,000, but the cap was overturned in court as being arbitrary. It is interesting to speculate whether a cap based on detailed research and a physical capacity constraint, such as the available water yield, would be upheld, but in practice the necessary services can always be provided somehow.
2. Moratorium, that is the denial of building, occupancy, or water connection permits. Massachusetts courts have upheld the imposition of a building moratorium through zoning for a stated time period (two years) needed to deal with a particular problem, such as contaminated water supply. Steps to solve the problem should be taken and money appropriated, if need be, at the time of imposition of the moratorium, and an escape mechanism should be provided where the moratorium imposes a special hardship. While numerous Massachusetts communities entertained moratorium proposals, those actually enacted have, to our knowledge, been for some uses, such as apartments, and not for all buildings.

Moratoriums do not extend to the subdivision of land. The Massachusetts laws enable a community to regulate but not to prohibit subdivisions. Once a preliminary subdivision plan has been submitted to the planning board and is followed within seven months by a definitive plan, the zoning in place at the time the preliminary plan was submitted governs that subdivision for eight years, (MGL, Chapter 40A, Section 6). For those reasons, moratoriums and subsequent zoning amendments generally have little impact on the creation of subdivision lots and their eventual use.



3. Development rate limitation which limits the number of building permits that may be issued municipality- or county-wide each quarter, year, or two years. These have been used in other states (California, Colorado, Florida, New York, Oregon), usually on a county or multi-community basis, with mixed results, and are being tried in a very limited way by Orleans, Massachusetts.

In Orleans, certain commercial uses are limited to a total of 80,000 square feet throughout the town within a one-year time period. An exception is made if the use can prove that it is of "net benefit" to the community.

For a commercial development, the limit would be on the floor area and not on the number of permits. A proposal to impose a building permit limitation causes, first, a rush to obtain permits to beat the effective date, which greatly increases the rate of development, at least temporarily, and, second, the need to develop and apply a system for the allocation of permits to applicants on some rational and not just on the "first come" basis. In most cases this means the development and adoption of an elaborate point system and the award of permits to the applications with the most points, which may include the provision of low-income housing, minimizing environmental impact, and locating in areas served by adequate public water supply and sewer system, etc. The need for the system to meet the Constitutional tests of due process and equal protection is what makes this approach very complex, controversial, and vulnerable to a legal challenge. In a 1984 publication of the American Planning Association, Managing Development in Small Towns, by David J. Brower, et al, the authors state: "an annual limit on building permits should be attempted only by local governments possessing considerable experience in growth management" and must be "based on a thorough and complex planning effort." In addition, innovative restrictions acceptable in high-growth Western and Southern states are prone to face tough sledding in conservative Massachusetts.

4. Phased or scheduled growth provisions are in use in a number of Massachusetts towns (Chilmark, Greenfield, Sandwich, Swansea, West Tisbury). The phased growth bylaw in Chilmark was upheld by the Supreme Judicial Court. These provisions limit the annual number of building permits per subdivision to seven lots or 15 percent--whichever is greater. This limits growth so town services can keep pace with it, yet treats all developers equally. Phased growth bylaws have been approved by the Attorney-General, but a provision subjecting the so-called "approval not required" lots on public ways to this restriction has been struck down.
5. Development impact fees or "exactions" to compensate for the need to expand town services are an indirect approach to growth control that is being used increasingly in Massachusetts, formally or informally. They have been adjudicated to be legal when carefully substantiated in other states (Florida, Utah). Exactions are best applied to major developments through the special permit process (but not through the subdivision approval!). The county (in other states) or community should establish well-substantiated standards of roadway capacity, open space, schools, water supply, etc. These provide for its residents or commuting workers, and then the developers are required to meet these standards by providing land and by expanding roads

or utilities outside their developments or by contributing money to escrow accounts used solely for these purposes. Note: the money must be spent on acquisition and construction, not on the operation and maintenance of these facilities. A variation of this approach is the "linkage" requirement in Boston, where the developer must provide housing or develop a blighted area as a condition of being the developer of a profitable project. Formal requirements assure equal treatment and help avoid unexpected or excessive "exactions".

When there is a well-substantiated, valid, and immediate social or environmental reason that is non-exclusionary and non-discriminatory, courts tend to uphold a temporary postponement of the exercise of private development rights. On the other hand, those of use who have homes in a community cannot legally prevent others from enjoying equal benefits in order that the character or the appearance of the community remain unchanged.

According to the Massachusetts Supreme (Judicial) Court: "A zoning by-law cannot be adopted to set up a barrier against the influx of thrifty and respectable citizens who desire to live in the district in question and who are able and willing to erect homes subject to reasonable restrictions." *Simon v. Town of Needham*, 311 Mass. 560 (1942). In another case, the court overturned the disapproval of a subdivision (which complied internally with the subdivision regulations) for the reason that its water demand would lower the pressure in town's water system. *Daley Constr. Co. v. Randolph Plng. Bd.*, 340 Mass. 149 (1959).

Communities may find that they need to use a combination of these techniques to limit growth. For example, moratorium would limit growth while the community decides between a development schedule or the use of impact fees.

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